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REVOCATION OF PAROL LICENSES.—"A license is an authority conferred by the owner of land upon another to do an act or series of acts upon the former's land, the licensee possessing no estate or interest in the land itself, or else an authority conferred upon the owner of servient land by one entitled to an easement therein to do an act or series of acts upon the servient land in obstruction of the easement." [1] A license being a mere authority, sufferance or permission, a matter of personal trust, confidence or favor, and differing from an easement in that it creates no estate or interest in the land, it may be generally stated that licenses are revocable at the pleasure of the licensor.[2]

Licenses coupled with an interest form a notable exception to this general rule.[3] In their nature they are closely akin to easements, and in general are governed by the same rules applicable to them. A distinction is also recognized between a license to do an act on the land of the licensor, and a license to do an act on the licensee's own land in obstruction of an easement therein. In the latter case

[1] 1 MINOR, REAL PROPERTY, § 132.
[2] Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80; Huff *v.* McCauley, 53 Pa. St. 206, 91 Am. Dec. 203.
[3] Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19; United Society of Shakers *v.* Brooks, 145 Mass. 410, 14 N. E. 622.

it is agreed that if the act be of a permanent nature and is actually performed the license is irrevocable.[4]

In dealing with the question of the revocation of parol licenses the courts have adopted without hesitation the general rule just stated where the license has as yet not been acted upon, or where there has been no consideration paid for the privilege claimed or no expense incurred by the licensee in connection therewith. Where, however, the licensee, acting upon the license, places a burden upon the land of another, and incurs expense in placing or maintaining the encumbrance thereon, or has paid valuable consideration for the exercise of the privilege, the courts are at variance. This lack of harmony in the decisions is often due to the reluctance of the court to apply a doctrine whose application frequently works a manifest injustice in the individual case. Another fruitful source of discord is the court's failure to preserve the distinction between an easement and a license. Perhaps the greatest confusion is caused by a misconception of the equitable doctrines of specific performance and estoppel, or the application of these doctrines to a state of facts not legitimately within their scope.

The first cause of lack of uniformity among the decisions calls for no discussion. The ground of hardship alone should never be considered sufficient to except a particular case from the application of a general rule of law.

The distinction upon a given state of facts between an easement and a license is in many cases subtle, and it is often difficult to discern a substantial difference. But the distinction once made, the result should easily follow. Easements lie in grant, and to create an easement, otherwise than by prescription (which supposes a grant) or the so-called easement by natural right, an instrument under seal and containing proper words of grant is necessary,[5] for an easement is a permanent interest in another's land with the right at all times to enter and enjoy it. A license, on the other hand, is founded upon personal confidence, is not within the statute of frauds, and the licensee has no interest in the land.[6] Strictly speaking then, no right to place a burden upon the land which is not revocable at will can be granted by a license, because the moment it ceases to be so revocable it creates an interest in the land and rises to the dignity of an estate or easement.[7] Since a mere licensee under a parol license cannot claim an easement, that requiring a deed, nor the benefit of a contract for an easement, that requiring writing

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[4] Stein *v.* Dahm, 96 Ala. 481, 11 So. 597; Morse *v.* Copeland, 2 Gray (Mass.) 302.

[5] Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421; Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

[6] 3 KENT'S COMMENTARIES, 5 ed., 452.

[7] Jones *v.* Stover, 131 Iowa 119, 108 N. W. 112.

under the statute of frauds,[8] there is no principle of law to prevent the licensor revoking at his pleasure.[9]

Yet where there is not merely a license but a contract to create an easement, although not in writing, there may still be such part performance of the contract as in equity to take it out of the statute of frauds, and under such circumstances, in a proper case, a court of equity will decree specific performance of the contract.[10] Many cases which merely state that a license after the licensee has incurred expenses is irrevocable, properly fall within this principle and are correctly decided.[11] Others illogically hold that the licensee by incurring expense on the faith of the license thereby transforms the license into an easement running with the land.[12] Still others erroneously consider an executed license a parol agreement or contract, and grant relief on that ground.[13] It is submitted, however, that where a mere license is given there is no express agreement to grant an easement, and it is by no means certain that the parties so intended. To imply such an agreement and then enforce it on the ground of specific performance is hardly justifiable upon any sound reason. It is not the province of courts to make contracts for the parties, and as a mere license implies no contract there is nothing upon which to base the doctrine of specific performance. Many cases, however, ignoring this principle yet hold that a license is irrevocable, although there is in fact no contract, nor even a consideration (a material element of all contracts) upon which to invoke the doctrine of specific performance.[14] Clearly such cases are wrong, and the licensor should be allowed to revoke. The granting of specific performance of such contracts by a court of equity involves no principles different from those applicable to other contracts within the statute of frauds. In order to justify specific performance of an agreement for an easement in land such agreement must be a complete and sufficient contract, founded not only upon a valuable consideration, but its terms defined by satisfactory proof, accompanied by acts of part performance unequivocably referable

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[8] Dorris *v.* Sullivan, 90 Cal. 279, 27 Pac. 216.

[9] In the recent case of Jann *v.* Standard Cement Co. (Ind.), 102 N. E. 872, the court seems to have gone unnecessarily into the subject of licenses as the decision might more properly have been based upon the law applicable to easements.

[10] Miller *v.* Brown, 33 Ohio St. 547; Wynn *v.* Garland, *supra*. "If an oral permission for the use of land as a way would, if under seal, have created an easement, equity may regard it as an equitable easement and irrevocable upon part performance by the licensee by expenditure of money, or otherwise." Kent *v.* Dobyns, 112 Va. 586, 72 S. E. 139.

[11] Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348; Russell *v.* Hubbard, 59 Ill. 335.

[12] And in Georgia this result is the embodiment of statute. Cherokee Mills *v.* Standard Cotton Mills, 138 Ga. 856, 76 S. E. 373.

[13] Curtis *v.* LaGrande Water Co., 20 Ore. 34, 23 Pac. 808, 10 L. R. A. 484.

[14] Rerick *v.* Kern, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; Huff *v.* McCauley, *supra*.

to the supposed agreement, and the remedy at law must be wholly inadequate.[15]

Estoppel with reference to parol licenses has been applied by many courts seemingly upon a misconception of this equitable doctrine. The doctrine of estoppel involves an element of fraud or deception on the part of one who by his false holding out has induced another to act thereon to his damage. Where a licensor by direct encouragement to expend money by assurance of title induces the licensee to act to his detriment, it seems the doctrine of estoppel is properly applicable. But such cases are rare, and present no difficulty. In the usual case this element of deception, or holding out by the licensor, is lacking, yet not a few courts hold in these cases that where the licensee has gone to expense as a result of the license and cannot be placed in *statu quo,* the licensor is estopped to revoke the license, which becomes irrevocable.[16] Clearly the doctrine of estoppel should not apply in such a case. Ordinarily, to work an estoppel *in pais* there must be a misrepresentation of fact, or an encouragement of one known to be acting upon a mistake of fact, or a holding out of false hopes to him by a definite promise. None of these elements are present in case of a mere license. The majority of the courts, and upon the better reason, have refused to apply the doctrine of estoppel to such a case, which seems in some jurisdictions to have been resorted to in order to escape the statute of frauds.[17]

The conclusion to be reached, and which seems supported by the weight of authority, is that a mere license is revocable at the pleasure of the licensor, notwithstanding the fact that the licensee has incurred expense on the faith of the license, or has given valuable consideration for the privilege, and although the circumstances of the case are such that the licensee cannot be placed in *statu quo.*[18]

It might be said in answer to those cases holding merely because

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[15] Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192; Eckerson *v.* Crippen, 110 N. Y. 585, 18 N. E. 443, 1 L. R. A. 487; Hazleton *v.* Putman, 3 Pinney (Wis.) 107, 54 Am. Dec. 158.

[16] Nowlin *v.* Whipple, 120 Ind. 596, 22 N. E. 669, 6 L. R. A. 159; Ruthven *v.* Farmers', etc., Co., 140 Iowa 570, 118 N. W. 915; Risien *v.* Brown, 73 Tex. 135, 10 S. W. 661; Clark *v.* Glidden, 60 Vt. 702, 15 Atl. 358; Curtis *v.* LaGrande Water Co., *supra.* See Shaw *v.* Proffitt, 57 Ore. 192, 109 Pac. 584, 110 Pac. 1092, where it is held that a license implied from silence or acquiescence with knowledge of expenditures by the licensee is revocable, *aliter* an express license.

[17] Hicks Bros. *v.* Swift Creek Mill Co., 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 38, 57 L. R. A. 720; Turner *v.* Mobile, 135 Ala. 73, 33 So. 132; Minneapolis Mill Co. *v.* Minneapolis, etc., Ry. Co., 51 Minn. 304, 53 N. W. 639; Belzoni Oil Co. *v.* Yazoo, etc., Ry. Co., 94 Miss. 58, 47 So. 468; Crosdale *v.* Lanigan, 129 N. Y. 604, 29 N. E. 824; Yeager *v.* Tuning, 79 Ohio St. 121, 86 N. E. 657, 19 L. R. A. (N. S.), 700; Pifer *v.* Brown, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497 (and note).

[18] Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509; Lewis *v.* Patton, 42 Mont. 528, 113 Pac. 745; Allerton *v.* Steele, 59 App. Div. 622, 69 N. Y. Supp. 594; Huber *v.* Stark, 124 Wis. 359, 102 N. W. 12; and cases cited in notes, 15 and 17, *supra.*

of the licensee's expenditure of money upon the faith of the license that the licensor will, because of the hardship of the case, not be allowed to revoke, that a court of equity is not without power to grant relief where it is necessary for the licensor to come into court to establish the revocation. On the ground that he who comes into equity must do equity the licensor in such a case may be compelled to allow the licensee to remove fixtures placed upon the land, or that being impracticable, he may be required to make just compensation therefor.[19]

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CONTRIBUTION AS BETWEEN JOINT TORT-FEASORS.—The rule is general and well established that one who has been forced to answer in damages for the full consequences of a wrong, for which others were equally liable, cannot exact contribution from his co-delinquents. This rule rests in the main upon two grounds. In the first place, one will not be permitted to found his cause of action upon his own misconduct. Contribution rests upon an equitable basis, and no equities can have their source in a breach of the law. He who contemns the law has placed himself so far beyond its pale that its machinery will not be set in motion to give him even partial relief from the consequences of his culpability. In the second place, the denial of contribution in such cases is believed to subserve the policy of the law in that it intimidates and deters potential tort-feasors by making each liable for the entire joint wrong and leaving the incidence of the burden to the election of the aggrieved party.

But, though the rule that there can be no contribution among joint wrong-doers has become well settled and inveterate, there are many exceptions to it. These exceptions are of such frequent occurrence that one writer has been led to make the statement that they have displaced the co-called "general rule" and that the latter is but an exception to the rule constituted by them.[1] A review of the cases bearing upon this subject indicates that the doctrine that joint tort-feasors cannot enforce contribution is departed from to a greater or less extent in the following instances:

(1) Where one is an active participant in the commission of a tort but is innocent of any evil intent. The overwhelming weight of authority is to the effect that, where there is no intentional nor deliberate violation of the law, and where the act is of such a nature that consciousness of wrong-doing is not necessarily presumed, then contribution will not be denied.[2] Under this head would be placed those cases of torts or injuries arising from mistakes, accidents, or involuntary ommissions in the discharge of official duty, acts that

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[19] Flick *v.* Bell, 110 Cal. xvii, 42 Pac. 813.

[1] Theodore W. Reath, in 12 HARV. LAW REV. 177.

[2] Thweatt *v.* Jones, 1 Rand. (Va.), 328, 10 Am. Dec. 538; Pennsylvania Steel Co. *v.* Washington & Berkeley Bridge Co., 194 Fed. 1011; Buskirk *v.* Sanders, 70 W. Va. 363, 73 S. E. 937; Jacobs *v.* Pollard, 64 Mass. 287, 57 Am. Dec. 105.